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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA PATRICK MURPHY,

Defendant and Appellant.

C084178

(Super. Ct. Nos. CM039312,
CM040103)

Following the trial court's denial of his motion to traverse and quash the two search warrants in this case, defendant Joshua Patrick Murphy pleaded no contest to possession of a large capacity magazine, a felony (Pen. Code, § 32310)¹ and possession of child pornography (§ 311.11, subd. (a)). The trial court placed him on four years' formal probation.

¹ Undesignated statutory references are to the Penal Code.

On appeal, defendant contends the trial court erred in denying his motion to quash and traverse the search warrants because the affidavit in support of the first warrant failed to establish probable cause and the second warrant was the fruit of the first warrant. We affirm.

BACKGROUND

Since defendant's sole contention goes to the validity of the search warrants and he entered a no contest plea, we take the facts from the affidavits in support of the search warrants, the testimony at the suppression hearing, and the probation report.

First Search Warrant

The affidavit in support of the first search warrant, issued on September 18, 2013, was prepared by Paradise Police Department Officer Jake Smith. He had two years and nine months experience as an officer and experience investigating hundreds of crimes, including illegal weapons offenses.

On September 10, 2013, an employee of Fins, Furs, and Feathers Sporting Goods in Paradise reported that the store received an illegal firearm from Joe Bob Outfitters in Kansas. The firearm was reportedly shipped to the store at the behest of defendant. The owner of the store reported that defendant came into the business earlier in the day and wanted to pick up a gun that was shipped to the business. The owner replied the gun had not arrived and California law would require him to wait 10 days before picking it up. He believed defendant was a "Constitutionalist"; defendant told the owner he was not subject to California law, he was not a resident of California, he lived "[o]n California," and California was a subsidiary of Washington D.C. Defendant also talked to a store employee about purchasing .223-caliber ammunition in bulk. When defendant was told shipments arrived in the afternoon, he left the store and said he would return later.

The store owner later reported to defendant that the weapon had arrived; it was a .223-caliber Ruger model SR-556, an illegal assault rifle due to the configuration of the magazine detachment mechanism, the flash suppressor, collapsible stock, and detachable

magazine. The package for defendant also had three illegal 30-round magazines. The bill of sale had a “bill to” section listing defendant at an address in Paradise, along with a phone number and e-mail address. An officer returned to the store and seized items while requesting the owner to contact them when defendant arrived to pick up his package.

On September 13, 2013, officers were informed defendant had returned to the store to pick up his package. Officers went to the store and found defendant at the front counter. When an officer asked defendant his name, he replied, “Do we have any reasonable expectation to contract today?” Defendant subsequently admitted purchasing the assault rifle from somebody else “outside of jurisdiction” and was arrested. A search incident to arrest found a letter to the store in which he disparaged the government and asserted that certain laws do not apply to him, as well as a credit card in his name that had the same last four digits as the one used to purchase the assault rifle. A search of defendant’s cell phone incident to arrest obtained information that defendant participated in the “Butte County Militia” and was often referred to as “Sgt. Jack.”²

The affidavit related efforts to verify defendant lived at the place to be searched, including Department of Motor Vehicle and vehicle registration checks, and a phone call with defendant’s mother. Defendant’s mother told investigators defendant lived at the address to be searched, and he owned two other firearms. The affidavit also related the assault rifle had been bought through the internet.

In support of authorization to search the contents of electronic devices for evidence of online research about purchasing illegal assault weapons, the affidavit stated that the officer knew through training and experience that people who bought online tended to conduct online research about the item on desktop or laptop computers, tablets,

² A motion to suppress the fruits of the cell phone search was filed by new counsel following defendant’s successful *People v. Marsden* (1970) 2 Cal.3d 118 motion; the motion had not been ruled upon at the time defendant entered his no contest plea.

personal digital assistants, or cell phones. Information on such devices “would tend to show evidence of importation, possession, manufacture or other acquisition of illegal firearms such as assault rifles.”

The concluding statement declared: “Your affiant knows from training and experience persons who make online purchases often conduct online research of the items they intend to buy. In addition to research about the items, persons who make online purchases also research different sellers, vendors or stores. [¶] Your affiant knows from training and experience, computers and other similar devices which connect to the internet, often contain internal records of web pages visited, transactions made, searches completed, files downloaded, and files viewed. These records are often date and time stamped.”

The warrant authorized a search of defendant’s residence for property or things used to commit or providing evidence of possession, manufacture, distribution, transportation, importation, sale, purchase, gift, loan, or construction of illegal assault weapons, including computers, tablets, personal digital assistants and cell phones capable of connecting to the internet, and “the physical devices and the data stored within.” The warrant also authorized searching files stored on paper or through various electronic means such as optical disks or flash drives, along with “indicia of use, ownership, possession, or control of such records.” In addition, the warrant authorized the search of all written or digital communication like e-mail or chat logs. Computers and computer-related equipment could be removed to and searched from a secure location, and all drives and devices were to be cloned with the clones searched. Also authorized was a search for “how to” manuals detailing ways or means of modifying and altering weapons. This included books, magazines, printed or photocopied guides, and digital files located on electronic devices capable of storing said files.

The First Search

Pursuant to the first warrant, officers searched defendant's residence and seized a computer, an SD memory card and adapter, some .223-caliber ammunition, one or two trigger assemblies, two tactical latches, and a shell catcher. An officer examined the SD card for how to manuals but found what he believed to be child pornography. After the officer opened two more files on the card and found child pornography, the search ceased and a second warrant was sought for evidence of child pornography.

Second Warrant and Search

The second warrant authorized a search of the same address as the first. The affidavit restated the information in the affidavit supporting the first warrant, and related how child pornography was found on the SD card during a search for how to manuals for modifying and altering weapons. It also stated that a camcorder was found in the residence, and was not collected as it was outside the scope of the first warrant. The second warrant authorized a search of the SD card and a desktop computer that was removed from the residence. The warrant also authorized a search for child pornography or written or electronic communications related to child pornography.

A search of the SD card pursuant to the second warrant found 326 images of child pornography.

Defendant filed a motion to quash and traverse both warrants, which the trial court denied.

DISCUSSION

Defendant contends the trial court erred in finding the first warrant was supported by probable cause, and the second warrant is invalid as the unlawful fruit of the allegedly improper first warrant. We disagree.

A defendant may move to suppress evidence obtained as the result of a search or seizure on the ground that there was not probable cause for the issuance of the search warrant. (§ 1538.5, subd. (a)(1)(B)(iii).) If the defendant moves to quash the search

warrant, “the court should proceed to determine whether, under the ‘totality of the circumstances’ presented in the search warrant affidavit and the oral testimony, if any, presented to the magistrate, there was ‘a fair probability’ that contraband or evidence of a crime would be found in the place searched pursuant to the warrant. [Citations.]” (*People v. Hobbs* (1994) 7 Cal.4th 948, 975 (*Hobbs*).)

When a defendant moves to quash a search warrant under section 1538.5, the trial court must determine whether, under the totality of the circumstances presented to the magistrate, there was a fair probability that contraband or evidence of a crime would be found in the place searched pursuant to the warrant. (*Illinois v. Gates* (1983) 462 U.S. 213, 238-239 [76 L.Ed.2d 527, 548-549].) “[T]he traditional standard for review of an issuing magistrate’s probable-cause determination has been that so long as the magistrate had a ‘substantial basis for . . . [concluding]’ that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. [Citations.]” (*Illinois v. Gates*, at pp. 236-237 [76 L.Ed.2d at p. 547].) “In reviewing the magistrate’s determination to issue the warrant, it is settled that ‘the warrant can be upset only if the affidavit fails as a matter of law [under the applicable standard announced in *Illinois v. Gates*, *supra*, 462 U.S. at p. 238] to set forth sufficient competent evidence supportive of the magistrate’s finding of probable cause, since it is the function of the trier of fact, not the reviewing court, to appraise and weigh evidence when presented by affidavit as well as when presented by oral testimony. [Citations.]’ [Citation.]” (*Hobbs*, *supra*, 7 Cal.4th at p. 975.) Thus, “[t]he magistrate’s determination of probable cause is entitled to deferential review. [Citations.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1041.) However, the courts independently determine whether, on the facts as found by the magistrate, the search was reasonable under the Fourth Amendment. (*People v. Hunter* (2005) 133 Cal.App.4th 371, 377.)

Defendant claims the first warrant was overbroad because it allowed for an unfettered search of his electronic devices without a sufficient showing of probable

cause. Relying on *Riley v. California* (2014) 573 U.S. ____ [189 L.Ed.2d 430] (*Riley*), he asserts that a warrant authorizing the search of electronic devices must be narrowly drawn and supported by particularized probable cause establishing that contraband is likely to be found on the devices to be searched. He finds insufficient support for the declaration in the first warrant's affidavit that how to manuals could be found on a computer. According to defendant, neither the training or experience of Officer Smith nor the affidavit's proposition that defendant might possess more illegal weapons provides adequate justification for a search for digital image files. He argues there was no information that could lead a reasonable person to conclude that defendant attempted to obtain other firearms or had ever attempted to modify firearms to illegal configurations. Finally, he claims there was no probable cause to believe that evidence of illegal weapons could be found in digital image files.

Riley does not apply to defendant's case, as it addressed the warrantless search of a cell phone incident to arrest, with the Supreme Court holding "that a warrant is generally required before [searching a cell phone], even when a cell phone is seized incident to arrest." (*Riley, supra*, 573 U.S. at p. ____ [189 L.Ed.2d at p. 451].) A search incident to arrest is justified "not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody." (*Id.* at p. ____ [189 L.Ed.2d at p. 445].) The increased privacy interest in modern cell phones capable of storing great quantities of data must be understood in this context. Given the heightened privacy interests in a cell phone, a warrant is generally needed before it can be searched. However, there is nothing special about the cell phone or any other device capable of storing great quantities of data that place additional requirements on a search warrant. After all, the warrants in this case authorized searches of defendant's residence, a place " 'where privacy expectations are most heightened.' " (*Kyllo v. United States* (2001) 533 U.S. 27, 33 [150 L.Ed.2d 94, 102].) While probable cause must support a finding of contraband or evidence of

contraband on electronic devices before a warrant can authorize the search, *Riley* does place any additional requirement on the warrant.

Probable cause supports the conclusion that illegal firearms or evidence of them could be found at defendant's residence. Defendant bought an illegal firearm out of state via the internet, had claimed he was not bound by California law, and his mother said that he had additional firearms at their home. From this, it is reasonable to conclude that more illegal firearms could be found at defendant's home and that he could have purchased them online. At the very least, the affidavit provided probable cause for searching computers and other electronic devices for evidence of the purchase of any illegal firearms. The affidavit's statement that information on electronic devices "would tend to show evidence of importation, possession, manufacture or other acquisition of illegal firearms such as assault rifles" is a reasonable inference from the supporting evidence. Since there was probable cause that evidence of the manufacture of illegal firearms could be found on electronic files, the affidavit supported searching image files for how to manuals and photographic evidence of firearms. "Constitutional concepts condemn 'general' warrants which impose little or no restriction on the area to be searched, the thing to be seized or the person to be arrested. [Citations.] The present warrant restricts search to designated places and seizure to designated articles." (*Williams v. Justice Court* (1964) 230 Cal.App.2d 87, 101.) The warrant properly authorized the search of electronic devices and the first search did not exceed that authority.

We are also unpersuaded by defendant's reliance on *U.S. v. Carey* (10th Cir. 1999) 172 F.3d 1268. The officers in *Carey* obtained a warrant to search two computers for " 'names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances.' " (*Id.* at p. 1270.) After a text-based search found no files related to drugs, an officer downloaded unfamiliar files to a disk and put the disk into another computer. (*Id.* at p. 1271.) The officer then was

able to immediately view a JPG file, which he opened and found to be child pornography. (*Ibid.*) The officer then downloaded 244 JPG files to 19 disks; he viewed five to seven files on each disk and found all were child pornography. (*Ibid.*) The Tenth Circuit found the search of the JPG files exceeded the scope of the warrant and were therefore illegally seized. (*Id.* at pp. 1275-1276.) Unlike the search in *Carey*, the warrant here properly authorized a search of image files. Also unlike *Carey*, the officer here did not continue searching after finding evidence related to a crime not in the scope of the warrant. Instead, the officer commendably stopped searching and sought a new warrant for evidence of child pornography after confirming the images could be child pornography. While we are not bound by *Carey* (*People v. Williams* (1997) 16 Cal.4th 153, 190), even if we were to follow it, *Carey* does not apply to this case.

Since both warrants were supported by probable cause, the trial court did not err in denying defendant's motion to quash and traverse. We therefore decline to reach his contentions regarding the inapplicability of the good faith exception to the exclusionary rule.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

MURRAY, J.

DUARTE, J.